

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA

12 JUN 20 AM 11:14

OFFICE OF THE CLERK

ELAINE JAMES, M.D.,

Plaintiff,

v.

THE STATE OF NEBRASKA;
NEBRASKA BOARD OF MEDICINE &
SURGERY; NEBRASKA DEPARTMENT
OF HEALTH AND HUMAN SERVICES,
DIVISION OF PUBLIC HEALTH,
an agency in the State of
Nebraska,

Defendants.

8:09CV112

COURT'S CHARGE
TO THE JURY

INSTRUCTION NO. 1

Now that you have heard the evidence and the arguments of counsel have been made, it is my duty to inform you of the legal principles and considerations you are to use in arriving at a proper verdict.

In accordance with the oath which each of you took when you were selected as jurors to try this case, it is your duty to determine the disputed issues of fact in this case from the evidence produced and seek thereby to reach a verdict which shall speak the truth of the case and thereby do justice between the parties hereto, uninfluenced by sympathy, favor, affection or prejudice for or against any party. It is your duty to receive and accept as correct the law as given you in this charge, and you are not privileged to entertain an opinion as to the law or

what the law should be which conflicts in any respect with the law as stated in this charge. However, I have not attempted to embody all the law applicable to this case in any one of the instructions which I have given you, and therefore, you must consider the instructions in their entirety, giving due weight to each instruction, and construing each instruction in the light of, and in harmony with, the other instructions, and so apply the principles set forth to all of the evidence received during the trial.

INSTRUCTION NO. 2

At the outset, I urge you to make every effort to reach an agreement in your deliberations. Inconclusive trials are not desirable. A common understanding among competent and intelligent people ought to be possible.

However, this observation must not be construed by any juror as a suggestion of the abandonment of an opinion held understandably and earnestly, just for the sake of agreement. The Court must never coerce agreements by jurors. It is appropriate to suggest that if you should find yourselves in apparent disagreement, each of you should carefully reexamine your opinions before assuming a position of dissent.

I should give you one preliminary word of caution. It is seldom wise or beneficial for a juror to make an emphatic expression of his or her opinion of the case, or to announce a determination to stand for a certain verdict, immediately upon entering the jury room at the beginning of deliberations. The reason for this is obvious. We are all human, and it is difficult to recede from a position once it has been firmly and definitely stated.

INSTRUCTION NO. 3

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

INSTRUCTION NO. 4

During the trial I have ruled on objections to certain evidence. You must not concern yourselves with the reason for such rulings as they are controlled by rules of law.

You must not speculate or form or act upon any opinion as to how a witness might have testified in answer to questions which I have rejected during the trial, or upon any subject matter to which I have forbidden inquiry.

In coming to any conclusion in this case, you must be governed by the evidence before you and by the evidence alone.

You have no right to indulge in speculation, conjecture or inference not supported by the evidence.

The evidence from which you are to find the facts consists of the following: (1) the testimony of the witnesses; (2) documents and other things received as exhibits; and (3) any facts that have been stipulated -- that is, formally agreed to by the parties.

The following things are not evidence: (1) statements, comments, questions and arguments by lawyers for the parties; (2) objections to questions; (3) anything you may have seen or heard about this case outside the courtroom.

INSTRUCTION NO. 5

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In determining the weight to be given to the testimony of the witnesses, you should take into consideration their interest in the result of the suit, if any appears, their conduct and demeanor while testifying, their apparent fairness or bias, their relationship to the parties, if any appears, their opportunities for seeing or knowing and remembering the things about which they testified, the reasonableness or unreasonableness of the testimony given by them, any previous statement or conduct of the witness that is consistent or inconsistent with the testimony of the witness at this trial, and all of the evidence, facts, and circumstances proved which tend to corroborate or contradict such evidence, if any appear. You are not bound to take the testimony of any witness as true, and should not do so if you are satisfied from all the facts and circumstances proved at the trial that such witness is mistaken in the matter testified to, or that for any other reason appearing in the evidence, the testimony is untrue or unreliable.

The fact that one side may have used a greater number of witnesses or presented a greater quantity of evidence should not affect your decision. Rather, you should determine which witness or witnesses, and which evidence appears accurate and trustworthy. It is the weight of the evidence that counts -- not the number of witnesses.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all of the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

INSTRUCTION NO. 6

A witness who has special knowledge, skill, experience, training, or education in a particular area may testify as an expert in that area. You determine what weight, if any, to give to an expert's testimony just as you do with the testimony of any other witness. You should consider the expert's credibility as a witness, the expert's qualifications as an expert, the sources of the expert's information, and the reasons given for any opinions expressed by the expert.

INSTRUCTION NO. 7

During the trial, some testimony was presented to you by depositions. Such testimony is under oath and is entitled to the same fair and impartial consideration you give other testimony.

INSTRUCTION NO. 8

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim depends upon that fact. The party who has the burden of proving a fact must prove it by the preponderance of the evidence.

By a "preponderance of the evidence" is meant the greater weight of credible evidence; that is not determined by the greater number of witnesses testifying in relation to the facts and circumstances, but that amount of evidence which on the whole, when fully, fairly and impartially considered, makes the stronger impression on your mind and is more convincing as to its truth when weighed against the evidence in opposition thereto. If the evidence is equally balanced, a preponderance is not established.

In determining whether a party to this action has sustained its burden of proof, you are not limited to the evidence introduced by that party. Any party to the case is entitled to the benefit of any evidence tending to establish its contention, even though such evidence comes from witnesses presented by the other party.

INSTRUCTION NO. 9

This is a civil action brought by Elaine James, M.D., who is the sole plaintiff in this action. It is brought against the State of Nebraska, the Nebraska Board of Medicine & Surgery, and the Nebraska Department of Health and Human Services, Division of Public Health, which are all public entities. Hereafter I may occasionally refer to the plaintiff simply as the "plaintiff" or by her proper or legal name. The defendants may be referred to as "defendants" or as "State of Nebraska."

INSTRUCTION NO. 10

All of the parties to a lawsuit are entitled to the same fair and impartial consideration, whether they are public entities or individuals.

Every act of every officer, employee or other agent, on behalf of or in the name of the public entity, if done within the scope of his authority, is in law the act of the public entity itself.

In this case, there is no dispute that the officers and employees or other agents of the Department of Health and Human Services and/or the Nebraska Board of Medicine and Surgery were done within the scope of their authority and thus constitute acts of the agencies and the State of Nebraska. There is also no dispute that plaintiff is disabled within the meaning of the Americans with Disabilities Act.

When these instructions refer to defendants, your finding need not be as to all the defendants; it may be as to one defendant or a combination of the defendants.

INSTRUCTION NO. 11

Plaintiff and defendants have stipulated -- that is, they have agreed -- that certain facts are established. You should, therefore, treat the following facts as having been proved:

- 1) Dr. James was accepted by the University of Nebraska Medical Center for a minimally invasive surgery fellowship in Omaha, Nebraska, starting on July 1, 2007.
- 2) Dr. James applied to the Nebraska Department of Health and Human Services (DHHS) for a Temporary Educational Permit (TEP) on June 4, 2007.
- 3) The application for the TEP contained a question concerning whether the applicant had been diagnosed and treated for a "mental or emotional disorder," and a second question which specifically asked if the applicant had been "diagnosed with or treated for bipolar disorder."
- 4) Dr. James answered yes to both of the aforementioned application questions.
- 5) Dr. James also supplied additional information to DHHS regarding her diagnosis of bipolar disorder.
- 6) The application for a TEP does not contain any questions regarding the physical conditions or disorders of the applicant.
- 7) Although there were no questions or requirements to disclose physical conditions or disorders, Dr. James disclosed

that she had been diagnosed with neurocardiac syncope, which required the placement of a pacemaker.

8) The Board of Medicine and Surgery (Board) considered the TEP application and voted to recommend to DHHS that a probationary TEP be offered to Dr. James based on her bipolar disorder and related hospitalizations.

9) The Board makes recommendations to DHHS with regard to applications for TEPs and initial licenses to practice medicine, the final decision with regard to offering a license, rejecting an application or disciplining the applicant is the decision of DHHS. DHHS, through Helen Meeks, offered a probationary TEP to Dr. James in a letter dated December 27, 2007. The letter set out 11 conditions for the probationary license and indicated that the probationary license would be considered a disciplinary action and would be shown as such on public records. The probation would also be reported to the applicable national databanks.

10) Dr. James appealed the disciplinary action on January 29, 2008.

11) Helen Meeks, Licensure Unit Administrator of the DHHS Division of Public Health, has the authority within DHHS to review TEP and license applications, consider the recommendations of the Board, and then make the decision for DHHS regarding such applications.

12) The applicant has the right to file an appeal regarding the decision and the matter can be appealed to the Director of the Division of Public Health of DHHS, the state's Chief Medical Officer, Joann Schaefer, M.D.

13) Dr. James applied for a license to practice medicine in the State of Nebraska on June 8, 2008.

14) The Board considered this application and voted to recommend to DHHS that a license with voluntary restrictions be offered to Dr. James. The reasons recited by the Board for the recommendation were Dr. James' diagnoses of bipolar disorder and "a serious cardiac condition."

15) DHHS declined to follow the recommendation for voluntary limitation, and on November 26, 2008, it issued a letter indicating that the Department of Health and Human Services would only offer Dr. James a license on a probationary basis. The letter set out 13 conditions of the probation. The probation would also be reported to the applicable national databanks.

16) Dr. James appealed the license decision on December 8, 2008.

17) On August 6, 2009, after an administrative hearing held on April 14, 2009, an order was entered granting Dr. James an unrestricted license to practice medicine and surgery in the State of Nebraska. An Amended Order was issued on September 4,

2009, that indicated it was superseding the previous order. The Amended Order also granted an unrestricted license to Dr. James.

18) After meetings of the Board with regard to Dr. James' TEP and full license, copies of the minutes of the meetings where Dr. James was discussed were posted to the internet. The TEP minutes indicated that the Board voted to place her license on probation and specifically mentioned her bipolar disorder as the basis for such actions. The minutes concerning her permanent license recited the vote to limit the permanent license, and specifically mentioned her bipolar disorder and cardiac condition as the basis for such action.

19) The minutes referred to above were available to the public on the DHHS website as public records.

20) DHHS controls the content of the DHHS website and posted the Board minutes concerning Dr. James on its website.

21) DHHS removed the minutes from its website in August 2010.

22) DHHS was unable to remove the minutes from the cache of search engines outside DHHS.

23) A "cached page" is a webpage that has been examined and stored ("cached") by the search engine (such as Google).

INSTRUCTION NO. 12

The law to be applied to this claim is the Americans with Disabilities Act, or ADA, which states:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

A "public entity" includes a State government, or an agency of a State government. The defendants are all "public entities" for the purposes of the ADA.

Medical licensing is one of the "programs" of a "public entity" that is protected by the ADA.

A "qualified individual with a disability" is an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

However, a person who poses a direct threat to the health or safety of others will not be a "qualified individual." A "direct threat" is a significant risk to the health and safety of others that cannot be eliminated by reasonable modifications to the public entity's policies, practices, or procedures. The determination that a person poses a direct threat cannot be based

on generalizations or stereotypes. The determination must be based on an individual assessment of the disabled person that relies on current medical evidence or on the best available objective evidence to determine the following: first, the nature, duration, and severity of the risk; second, the probability that the potential injury will actually occur; and third, whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

A qualified person with a disability must receive meaningful access to the programs of a public entity, not just limited participation in the program.

To receive money damages, Dr. James must show that defendants acted with "deliberate indifference." The deliberate indifference standard does not require a showing of personal ill will or animosity toward the disabled person, but rather can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of plaintiff's federally protected rights under the ADA.

INSTRUCTION NO. 13

I shall now explain the claims which have been made by the parties in this case and which are pertinent to your deliberations.

The plaintiff, Elaine James, M.D., has brought this action against defendants under the Americans with Disabilities Act, or the ADA. Dr. James seeks money damages for losses she claims were caused by defendants' discrimination against her during the medical licensing process. Dr. James claims that defendants discriminated against her because of her disability, and not because she was unqualified or because she posed any direct threat to the health and safety of the public. Dr. James claims that she was not given meaningful access to defendants' medical licensing program, but instead was allowed only limited participation in the program, because of her disability. Finally, Dr. James claims that the defendants acted with deliberate indifference to the strong likelihood that their actions would violate Dr. James' rights.

The defendants deny that they discriminated against Dr. James. They say that she was not a qualified individual during the time of the licensing process because she posed a direct threat to the health and safety of others. Defendants claim that they offered Dr. James probationary licenses that would allow monitoring of her ongoing treatment and stability. Defendants claim that they relied on medical knowledge and substantial objective evidence relating to Dr. James individually in making

this decision to reasonably modify their licensing procedures. Finally, defendants claim that they did not act with deliberate indifference to Dr. James' protected rights, because their actions did not result in a violation of Dr. James' rights.

You will understand, members of the jury, the foregoing summary constitutes only a brief analysis of the claims made respectively by the parties in this case and must not be taken or considered by you as any evidence in this case.

INSTRUCTION NO. 14

Your verdict must be for plaintiff and against a defendant if all of the following elements have been proved:

First, defendant is a public entity.

Second, at the time that a defendant offered plaintiff a probation license or a temporary medical license, plaintiff was a qualified individual with a disability because:

- A. She met the essential eligibility requirements for participation in the state medical licensing program, AND
- B. Either she did not pose a direct threat to others, or such direct threat could have been eliminated by reasonable modifications to defendants' policies, practices, or procedures.

Third, a defendant denied plaintiff meaningful access to the medical licensing programs by reason of her disability.

Fourth, a defendant was deliberately indifferent to the strong likelihood that its actions with regard to the plaintiff would result in a violation of her rights as guaranteed by the ADA.

The parties agree that the first element has been established.

If you find that plaintiff has failed to prove element 2, 3, or 4 as to any defendant, then your verdict will be for that defendant.

If you find by a preponderance of the evidence that plaintiff has proved all of elements 2, 3, and 4 as to any

defendant, then your verdict will be for plaintiff and against that defendant.

INSTRUCTION NO. 15

If you find in favor of plaintiff under Instruction No. 14, then you must award plaintiff such sum as you find will fairly and justly compensate her for any damages you find plaintiff sustained in the past and is reasonably certain to sustain in the future as a direct result of defendants' actions.

Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture, and you must not award any damages by way of punishment or through sympathy. You may not include in your award any sum for court costs or attorneys' fees.

INSTRUCTION NO. 10

If you find in favor of plaintiff under Instruction No. 14 but you find that the plaintiff has not established that any of the defendants acted with "deliberate indifference" as defined in Instruction No. 12, then you must return a verdict for plaintiff in the nominal amount of One Dollar (\$1.00).

INSTRUCTION NO. 17

If you find that the plaintiff will sustain lost future earnings, then you must reduce those future damages to their present value. The present value of future damages is the amount of money that will fully compensate the plaintiff for future damages, assuming that amount is invested now and will earn a reasonably risk-free rate of interest for the time that will pass until the future damages occur.

You must not reduce to present value any non-economic damages you find that the plaintiff is reasonably certain to sustain in the future, such as for mental anguish.

INSTRUCTION NO. 18

In the trial of this case and in this charge, I have in no way attempted to express my opinion as to who should prevail upon the issues submitted to you. You must not construe any statement, action, or ruling on my part in the trial of this case as an indication of any opinion on my part respecting the proper course of your verdict. During the course of a trial, I occasionally ask questions of a witness in order to bring out facts not fully covered in the testimony. Do not assume that I hold any opinion on the matters to which the questions related.

So regardless of what I may have chosen to say, I must admonish you that you are the sole judges of the facts, and your verdict must respond to your own conclusions from the evidence.

INSTRUCTION NO. 19

Upon retiring to the jury room, you shall first select one of your number as foreperson to preside over your deliberations and who alone will sign the verdict form. You will then proceed immediately with your study and deliberations of the case.

In arriving at your verdict, remember it must be unanimous. Short of unanimity, you cannot consider that you have reached a verdict.

You will take with you a verdict form which you will use to reflect your verdict.

After you have arrived at your verdict, your foreperson will simply fill in the appropriate blank spaces provided in the form of verdict. Your foreperson will then date and sign the verdict form and that will constitute your verdict.

If it becomes necessary during your deliberations to communicate with the Court, your foreperson should write a note to me on a piece of paper. Your foreperson should then use the telephone in the jury deliberation room to call my office. The telephone will ring in my office and your note will be picked up and delivered to me. Bear in mind you are not to reveal to me or to anyone else how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

You will be allowed to separate for your meals and for any necessary intermission between 5 p.m. today and tomorrow

morning at 9 a.m. In addition, you are to keep in mind all of the earlier admonitions of the Court and especially to refrain from any discussion of the case with anyone and to avoid reading or viewing any news about this case.

As the Judge presiding over the trial, I shall be available in this building throughout your deliberations and until your verdict has been returned and shall receive it promptly upon its return.